

Cornell Law Review

Volume 13

Issue 2 February 1928

Article 1

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Recommended Citation

Horace E. Whiteside, *Suspension of the Power of Alienation in New York*, 13 Cornell L. Rev. 167 (1928)

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CORNELL LAW QUARTERLY

VOLUME XIII

FEBRUARY, 1928

NUMBER 2

SUSPENSION OF THE POWER OF ALIENATION IN NEW YORK*

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VI. RESULTS OF THE DECISIONS

As Professor Gray so aptly put it,²²⁷ "In no civilized country is the making of a will so delicate an operation, and so likely to fail of success as in New York". For proof of the truth of this assertion one needs examine only a few of the recent volumes of the New York Reports, and the reports of the inferior courts, and note the number of cases in which the validity of future limitations and testamentary trusts has been litigated.²²⁸ And yet the statutes have been in operation for ninety-seven years. One hesitates to speculate on the number of titles that might be attacked as depending on wills illegally suspending the power of alienation. To paraphrase the Revised Statutes with the additions and amendments thereto, as they have been construed, the courts have said to the citizen:²²⁹

"If you would draw any but the simplest will, you must realize that it will probably result in long and expensive litigation which will waste your estate and create lasting and bitter enmities among your descendants. You may not establish a trust of real property except for one of the four purposes authorized by statute. Likewise, trusts for the purpose of accumulations are strictly limited by statute. You may not create any trust for a gross period, nor one which is

*This is the second and final installment of the article, the first having appeared in (1927) 13 CORNELL LAW QUARTERLY 31.

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²²⁷GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) § 750.

²²⁸In the last fifteen volumes of the New York Supplement, reporting cases from the Supreme Court and the inferior courts, at least fifty cases appear which involved suspension of alienation by trust, accumulations, vesting or powers. Only four of these were trusts not created by will. They cover a period of two years and seven months (Jan. 19, 1925 to Aug. 15, 1927). From May 25, 1926 to July 20, 1927, opinions were handed down in six cases on these subjects by the Court of Appeals (*supra* note 2). Others were argued and disposed of by memoranda.

²²⁹In support of the assertions made, see generally the first installment of this article, (1927) 13 CORNELL LAW QUARTERLY 31.

to continue for more than two lives in being at your death, unless the trust for a gross period is destructible at all times, and the trust for lives is destructible at all times after two designated lives in being. You may not create future contingent interests unless the same are certain to vest within the period of two designated lives in being at your death. Experience has demonstrated that you may not rely confidently on the advice of your attorney in these matters. Only by taking the wisest of counsel may you attempt with any degree of assurance to make provision for your grandchildren at the death of your children, or for other descendants of beneficiaries. The creation of trusts and future interests by you in your lifetime is limited in like manner.

"If you would create a trust for the preservation of your estate, and to pay rents, income and profits to your widow and descendants or other relatives, you *must create a spendthrift trust; no other kind will be permitted*; and after you have created this spendthrift trust, the courts will destroy your most cherished wishes, if the trust you have attempted to create may by any possibility continue during the lives of more than two of the objects of your bounty. If you leave only two dependents, you may safely provide for them by a trust during their lives, but you must not go further. If you are survived by more than two dependents, the difficulty of such provision is increased many fold. It is the policy of the laws of this state to discriminate against a testator who leaves more than two dependents, and to discourage the use by him of trusts as a means of providing for beneficiaries. Such testator may accomplish his object by creating a separate trust for each beneficiary, but his intention must be clearly indicated. The fund set apart for each beneficiary may be held in trust during only two designated lives of persons in being at the death of the testator, and it must be disposed of absolutely at the termination of such lives.

"We will indicate a few signposts to be your dim and uncertain guides. The purposes for which trusts of personal property may be created are not limited by statute, and where the trustee has a power and duty to convert real property into personal property, the rules as to the latter will apply. Trusts which can be revoked at the will of the settlor may be lawfully created to continue for a term of years or beyond two lives in being, but the power of revocation should be expressly reserved. Likewise, trusts which can be destroyed at the option of the beneficiary or trustee are not destroyed by the statute. Therefore, give your executor or trustee an absolute power not only to exchange, or sell and reinvest the

property held by him, but also an absolute discretion to terminate his trust or holding, effective at least at all times after two designated lives in being. A like power in the beneficiary of the trust to call for a termination of the trust and a distribution of the fund, at any time after two designated lives in being, will save the trust. You may provide for legacies of fixed amounts payable in a lump sum or in installments, or annuities of fixed sums where not dependent on income or profits of a trust fund, by means of a charge or power. Other powers and powers in trust must be so framed as not to suspend the power of alienation beyond two designated lives in being.

"Direct no accumulation of the income of property except for the benefit of an infant, and unless it is to commence within two lives in being, and during the life of the infant for whose sole benefit the accumulation is directed, and such accumulation must end with the majority of the infant, and the fund so accumulated must then be paid over to him absolutely. Further than this, certain accumulations may be created for charitable purposes in accordance with the provisions of special statutes. Whenever possible indicate your intention that future interests be vested in persons who must certainly be *in esse* and *ascertained* at the termination of not more than two lives in being. Never create a contingent future interest which is to vest after a term of years or after more than two lives in being at the creation of the interest. It is immaterial that such future interest may be alienable."

VII. WHETHER THESE RESULTS ARE JUSTIFIED

A reasonable doubt may be expressed whether the results of the cases set forth in the first installment of this article are desirable, or the decisions of the courts justified in respect of the following points: *First*, in holding that the statutes against suspending the power of alienation and the absolute ownership of property were directed at such suspension by trusts; *Second*, in reaching this result in respect of trusts of personal property; and *Third*, in holding that a rule against remoteness of vesting is in force in New York.

THE REVISED STATUTES WERE NOT DIRECTED AT SUSPENSION OF THE POWER OF ALIENATION BY TRUSTS

Summary of the statutory provisions. It is submitted that the Revised Statutes were not directed at suspension of the power of alienation by trusts. In the title devoted to the "Nature and Qualities of Estates in Real Property, and the Alienation thereof,"²³⁰ after

²³⁰*Supra* notes 1 and 5. The sections referred to in this paragraph are now contained in Art. 3 of the Real Property Law, § 30 *et seq.*

defining estates of inheritance, estates for life, and estates for years, and abolishing the estate tail (converting it into a fee), the legislature proceeds in sections 7 and 8 to divide estates, in respect of the time of their enjoyment, into estates in possession, and estates in expectancy, defining the former as an estate "where the owner has an immediate right to the possession of the land," and the latter as an estate "where the right to the possession is postponed to a future period." In section 9 estates in expectancy are further divided into "estates commencing at a future day," or future estates, and reversions. In section 10 it is provided that future estates include those limited to commence in possession at a future day either without the intervention of a precedent estate or on the determination of a precedent estate, thereby embracing common law remainders and reversions, as well as springing and shifting uses and executory devises. In section 13 future estates are defined as either vested or contingent and a test is given for determining their character in this respect.²³¹ Sections 14, 15 and 16 have been quoted above;²³² section 14 defines suspension of the power of alienation and provides against such suspension by the creation of future estates; section 15 provides against suspension "by any limitation or condition whatever" and defines the period within which the power of alienation may legally be suspended; and section 16 provides for the exceptional case of suspension during a minority following two lives. Subsequent sections provide that not more than two successive life estates shall be created;²³³ that no remainder shall be limited on an estate *pur autre vie* unless it be a remainder in fee;²³⁴ that remainders shall be accelerated in certain cases;²³⁵ that a contingent remainder in a term of years shall not be created unless it must vest in interest by the end of not more than two lives in being;²³⁶ etc. By section 23 all the provisions relative to future estates are made applicable to chattels real. This is followed by provisions²³⁷ permitting the creation of freehold estates and chattel interests to commence at a future day; estates for life and remainders vested or contingent in a term of years; a fee upon a fee; two or more future estates in the alternative;²³⁸ and remainders by way of conditional limitations.²³⁹ Certain rules of

²³¹"Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, while the person to whom, or the event upon which they are limited to take effect, remains uncertain." Now R. P. L. § 40.

²³²*Supra* notes 106, 188.

²³³R. S. § 18, R. P. L. § 44.

²³⁴R. S. § 20, R. P. L. § 46.

²³⁵R. S. § 25, R. P. L. § 51.

²³⁶R. S. § 17, R. P. L. § 43.

²³⁷R. S. § 19, R. P. L. § 45.

²³⁸R. S. § 24, R. P. L. § 50.

²³⁹R. S. § 27, R. P. L. § 53.

construction are laid down and the common law rules of destructibility of contingent remainders are abolished. By section 35 expectant estates are made descendible, devisable and alienable, in the same manner as estates in possession. Section 36 provides that dispositions of rents and profits of land, to accumulate subsequent to the execution of the instrument creating such disposition shall be governed by the rules established in relation to future estates in lands. This is followed by sections providing for legal accumulation of rents and profits within limits,²⁴⁰ and other sections not material to our problem.

In the second article of the same title²⁴¹ uses and trusts in land are abolished for the future except for the four classes preserved in section fifty-five,²⁴² passive trusts are converted into legal estates,²⁴³ resulting trusts abolished in certain cases and regulated in others.²⁴⁴ Section fifty-seven makes surplus rents and profits of a trust, beyond the sum necessary for the education and support of the beneficiary, liable in equity to the claims of creditors. Sections 58 and 59 provide that certain attempted trusts shall be effective as powers in trust, and the title shall remain in or pass to the persons entitled thereto, subject to the execution of the power. Section 60 provides that the trustee of a valid express trust shall have the "whole estate . . . , in law and in equity, subject only to the execution of the trust" and the beneficiary shall take "no estate or interest in the lands, but may enforce the performance of the trust in equity." This section is explained in the two following sections as has been indicated.²⁴⁵ Section 63 provides that no beneficiary can assign or in any manner dispose of his interest, unless it is "for the payment of a sum in gross." Section 64 provides, "where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute as against the subsequent creditors of the trustees," without notice, and as against subsequent purchasers for value without notice. But in section 65, "where the trust shall be expressed in the instrument vesting the estate, every sale, conveyance or other act of the trustees, in contravention of the trust shall be absolutely void." Subsequent sections of this article deal with the termination of trust interests. The third article deals with powers.

²⁴⁰R. S. § 37, R. P. L. § 61, in part.

²⁴¹Now Art. 4 of the R. P. L. §§ 90 *et seq.*

²⁴²R. S. § 45, R. P. L. §§ 91, 96. ²⁴³R. S. §§ 47, 50, R. P. L. §§ 92, 93.

²⁴⁴R. S. §§ 50-54, R. P. L. §§ 94, 95.

²⁴⁵*Supra* (1927) 13 CORNELL LAW QUARTERLY 41-43.

The language of these statutes does not justify the interpretations that have been read into them. An examination of these sections of the Revised Statutes nowhere discloses any express provision subjecting trusts to the operation of the rule against suspension of the power of alienation unless it be the concluding phrase of section 55 (3), "subject to the rules prescribed in the first Article of this title." It is upon this slender foundation that the whole mighty structure has been raised. As to the first article, *the estate of the trustee under sections 7 and 8 must necessarily be an estate in possession*, since he is the "owner" by virtue of section 60 and has "an immediate right to the possession of the land," and his estate cannot by any means be construed into an estate in expectancy or a future estate within sections 9 and 10. By section 60, again, *the beneficiary has "no estate or interest in the lands,"* either in possession or in expectancy, but only a personal right against the trustee. By section 14 it is *future estates* which are void for suspension of the power of alienation. By section 15 the prohibition is against suspension of alienation by a "*limitation or condition.*" By reason of the fact that the revisers originally proposed two sections which were combined by the legislature into section 15, one of which (the original section 17)²⁴⁶ referred to future estates and the other (originally section 15) did not expressly refer to future estates, the argument was made, and successfully,²⁴⁷ that it was the intention of the revisers to provide against suspension of the power of alienation of present interests in their section 15, and against suspension of the power of alienation by future estates in their section 17, and that this intention was adopted by the legislature when the two sections were combined. This argument is open to two objections: (1) it assumes that the legislature adopted this hypothetical intention, whereas the combination of the sections indicates the contrary; (2) it assumes that the original section 15 was directed against suspension of alienation by present interests. If true, it must be said that the revisers, who were men of great erudition and ordinarily given to great clarity of expression, in this case, concealed their meaning in enigmatic words. It is improbable

²⁴⁶"In every creation of a future estate, the absolute power of alienation shall not be suspended longer than the lives of two persons then in being."

²⁴⁷*Coster v. Lorillard*, 14 Wend. 265, 305, 319 (N. Y. 1835). Cf. s. c., 5 Paige, 172, 213, 219 (N. Y. Chan. 1835). Since §§ 14, 15 and 16 of the R. S. were combined in § 32 of the R. P. L. of 1896 (now § 42 R. P. L.), there is even less statutory justification for the holding that the suspension of alienation by present trusts is prohibited by the statute. See the report of the Board of Statutory Consolidation (1907), pages 4896-7, quoted in book 49 of McKinney's Consolidated Laws of N. Y., page 62.

that a result so important and far-reaching would have been intended to result from such ambiguous language. It is much more probable that section 15 was directed at suspension of the power of alienation by *future limitations and conditions*, which would be intelligible to one versed in the common law of real property, and that the qualification in section 55 (3) was intended to make it clear that estates in trust could be created in the same way as ordinary legal estates, but subject to the same limitations when created by way of future estates.²⁴⁸

The notes of the Revisers. If we turn to the notes of the revisers, we find no intimation either in the notes to Article First, or in those to Article Second, that they feared suspension of alienation by trusts, or that the statutes were directed at suspension of alienation by present vested interests. In their notes the revisers express the belief that the proposed statutes will, "extricate this branch of the law, from the perplexity and obscurity in which it is now involved, and render a system simple, uniform, and intelligible, which, in its present state, is various, complicated and abstruse."²⁴⁹ And later they say:

"The interests of society require that the power of the owner to fetter the alienation and suspend the ownership of an estate by future limitations, should be confined within certain limits".²⁵⁰

After pointing out the confusion in the common law in respect of the three classes of future estates (remainders, springing and secondary uses, and executory devises), each with its technical rules as to creation and destruction, the revisers expressed a wish to,

"...abolish all technical rules and distinctions, having no relation to the essential nature of property and the means of its beneficial enjoyment, . . . to define with precision the limits within which the power of alienation may be suspended by the creation of *contingent estates*, and to reduce all *expectant estates* substantially to the same class, and apply to them the same rules whether created by deed or devise."²⁵¹

In their notes to section 10, they say:

"As future estates cannot, under the following sections of this Article, create a suspension of ownership, for a longer

²⁴⁸See *Kane v. Gott*, 24 Wend. 641, 662 (N. Y. 1840), quoted *infra* p. 180.

²⁴⁹Report of the Revisers to the Legislature (1828), Part II, Chap. I, p. 21. The notes of the revisers follow Article First. They also appear in the second and third editions of the Revised Statutes.

The revisers appeared as counsel in *Hawley v. James*, *infra* note 254; *Coster v. Lorillard*, *supra* note 247, and other early cases. Their arguments are given in the reports of these cases, but it is not believed that their true intention can be found in such partisan arguments.

²⁵⁰*Ibid.* Note that "*future limitations*" are objected to.

²⁵¹*Ibid.* Italics are author's.

period than remainders, no rules of public policy are violated by their permission."²⁵²

They speak repeatedly of the objection to rendering property inalienable, and the way in which this is done, and never clearly of any objection to mere remoteness of vesting. They say:

"...an estate is never inalienable, unless there is a contingent remainder, and a contingency has not yet occurred. Where the remainder is vested, . . . there is no suspense of the power of alienation, for the remainderman and the owner of the prior estate, by uniting, may always convey the whole estate. This is the meaning of the rule of law prohibiting perpetuities, and is the effect of the definition in § 14."²⁵³

It is nowhere intimated that they intended to substitute a system which is certainly more complicated than the common law knew, consisting of a rule against suspension of the power of alienation by contingent future interests, a rule against remoteness of vesting, a rule against suspension of the power of alienation of specific property by trusts, and a rule making illegal any indestructible trust, limited to continue beyond two lives in being, whether or not the trustee has power to sell or exchange the specific trust property.²⁵⁴ There is nowhere any suggestion that the statutes were directed against suspension of the power of alienation by trusts, or that they intended to introduce on this point a complicated rule which was unknown to the common law. At common law trusts neither suspended the power of alienation²⁵⁵ nor violated any rule against remoteness of

²⁵²*Ibid.* 22.

²⁵³*Ibid.* 23.

²⁵⁴*Hawley v. James*, 5 Paige, 318, 444 (N. Y. Chan. 1835), *aff'd*, 16 Wend. 61, 163 (N. Y. 1836); *Savage v. Burnham*, 17 N. Y. 561 (1858). *Accord*: *Grand Rapids Tr. Co. v. Herbst*, 220 Mich. 321, 190 N. W. 250 (1922); *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650 (1902). *Cf.* *Michigan Tr. Co. v. Baker*, 226 Mich. 72, 196 N. W. 976 (1924), effect of equitable conversion.

Section 228 of the proposed Civil Code of 1865 provides, "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 201." This was said to be declaratory of the existing law. The notes to § 201 (which is based on R. S. § 15) state that any limitation or condition includes a trust of real property. *Cf.* § 172, quoted *infra* note 264, and similar provisions in the proposed code of 1872, § 40; proposed code of 1884, §§ 280, 281, 321.

²⁵⁵In *Lorillard v. Coster*, 5 Paige, 172, 213 (N. Y. Chan. 1835), Chancellor Walworth expressed the opinion that all the trusts and limitations attempted in the will were valid, citing *Cadell v. Palmer*, and continued, "I know of no way in which a present vested interest in real property could have been rendered absolutely inalienable previous to the adoption of the Revised Statutes. The only way in which a conveyance of an absolute fee could be prevented, was by the limitation of a future or contingent interest or estate in the property, in

vesting,²⁵⁶ though unvested interests following a trust might be open to objection on either of these grounds. So at common law no objection to the duration of a trust was raised where all of the interests were vested,²⁵⁷ and it was possible by the better rule for a competent *cestui que trust* of full age to call for a conveyance from the trustee and thereby terminate the trust.²⁵⁸ *The revisers wished to simplify the rules of the common law and not to make them more complicated. By reading into the system devised by them a rule against suspension of the power of alienation by present interests, by way of trusts, the courts have given us an exceedingly complicated and artificial system.*^{258a}

favor of a person not in esse, or in favor of one who was not ascertained at the time of the creation of such estate or interest."

The *cestui que trust* may, unless restrained by the trust instrument, convey his interest: *Hiss v. Hiss*, 228 Ill. 414, 81 N. E. 1056 (1907); *Elliott v. Armstrong*, 2 Blackf. 198, 208 (Ind. 1829); *Sprague v. Moore*, 130 Mich. 92, 89 N. W. 712 (1902), conveyance to trustee valid. For other cases, see BOGERT, TRUSTS (1921) 433-435. The doctrine of *Claffin v. Claffin*, *infra* note 258, arose long after the adoption of the Revised Statutes.

²⁵⁶*Hart v. Seymour*, 147 Ill. 598, 613, 35 N. E. 246 (1893); *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635 (1896); *Harlow v. Cowdrey*, 109 Mass. 183 (1872); GRAY, PERPETUITIES (3d ed. 1915) §§ 232-237d, 245c-245e, 895-909.

²⁵⁷For the orthodox doctrine, see *supra* note 256. Cf. (1924) 9 CORNELL LAW QUARTERLY 422, 428 *et seq.*, for argument *contra*. Cf. also Fraser, *Suspension of the Power of Alienation* (1925) 9 MINN. L. REV. 314, 324.

But if no equitable interest under the trust may arise within the limits of the rule against perpetuities, the trust will be void: *Mainwaring v. Baxter*, (1894) 2 Ch. 310; *In re Bewick*, (1911) 1 Ch. 116; GRAY, *op. cit. supra* note 256, § 413.

²⁵⁸*Saunders v. Vautier*, 4 Beav. 115 (Ch. 1841); *Wharton v. Masterman*, (1895) A. C. 186; *Bakle v. Ingram*, 142 Calif. 15, 75 Pac. 566 (1904); *Huber v. Donaghue*, 49 N. J. Eq. 125, 23 Atl. 495 (1891); *Turnage v. Green*, 55 N. C. 63 (1854).

But the majority of American jurisdictions have followed *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454 (1889), which permitted the settlor to create an absolute and indefeasible equitable interest in the beneficiary, and then provide that it should be indestructible for a period beyond the minority of the beneficiary. The authorities are collected in BOGERT, *op. cit. supra* note 255, at 580-582. For a discussion of possible limitations on the duration of such trusts, see GRAY, *op. cit. supra* note 256, § 121i; (1924) 9 CORNELL LAW QUARTERLY 428-431; (1911) 10 MICH. L. REV. 31, 37.

^{258a}But the courts have continued to eulogize the revisers and praise the simplicity of the statutory system: See the opinion of Savage, C. J., in *Coster v. Lorillard*, *supra* note 247, at 297, 298. He thought that the devise in question would have been valid at common law, and then commented on the effort of the revisers to "extricate this branch of the law from the perplexity and obscurity in which it was involved; and render a system simple, uniform and intelligible, which was various, complicated and abstruse."

The revisers did not intend to restrain alienation of his interest by a competent cestui que trust. Even conceding that a rule against suspension of the power of alienation of present interests was intended, it is doubtful if it was within the intention of the revisers by section 63 to prevent a competent *cestui que trust* of full age from alienating his interest. This would be a radical innovation on the common law, and yet no mention is made of it in the notes of the revisers, but there is evidence that the section was intended for the benefit of married women, infants, and incompetents. Subdivision 3 of section 55, as originally proposed provided for trusts of rents and profits for the "education and support, or support only, of any person. . ." This was changed by the legislature to "education and support or either," and in 1830 was changed to "use". When this provision is read in the light of its transition, and in connection with the notes of the revisers,²⁵⁹ it seems they intended to authorize such trusts at least primarily for persons under some disability, and by section 63 quite

Senator Young, *ibid.* 369 admitted there would have been no difficulty at common law, and said, "The views of the chancellor and vice chancellor, on several important points, conflict with each other; no two of the revisers agree on the argument, in their expositions of those sections of the statute which are supposed to have a material influence upon the decision of this cause; and of the seven learned counsel, there was no one who did not disagree with all the rest, both in his premises and conclusions."

Andrews, J., in *Walker v. Marcellus*, etc., Ry., 226 N.Y. 347, 350, 123 N. E. 736 (1919), speaking of the revisers, said, "Their design was to simplify, not to complicate, the transfer of real estate—to restrict, not to extend, the limitations which a grantor might impose upon it."

Cf. also Senator Mack in *Hawley v. James*, *supra* note 254, at 205; *In re United States Trust Co.*, 78 Misc. 227, 234, 138 N. Y. Supp. 156 (1912).

²⁵⁹Notes of Revisers, *supra* note 249, at 42: "As the creation of trusts is always in a greater or less degree a source of inconvenience and expense...express trusts should be limited as far as possible, and the purposes for which they may be created, strictly defined. The object of the Revisers in this section is to allow the creation of express trusts...only where the purposes of the trust require that the legal estate should pass to the trustee. An assignment for the benefit of creditors, would in most cases be entirely defeated, if the title were to remain in the debtor, and where the trust is to receive the rents and profits of lands, and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spendthrift, (the general objects of trusts of this description) the utility of vesting the title and possession in the trustees, is sufficiently apparent." (Note to revisers' § 56, enacted as R. S. § 55.) The revisers also speak repeatedly in their notes of the desirability of protecting creditors, a purpose which seems to have been defeated by the broad interpretation given to § 63.

Cf. the opinion of McCoun, V. C., in *Lorillard v. Coster*, *supra* note 255, at 187-8; *DeGraw v. Clason*, 11 Paige, 136, 140 (1844); Proposed Civ. Code (1865) § 285; Proposed Civ. Code (1884) § 401.

properly restrained such beneficiaries from alienating their interests. When the language was amended to read "use", and when trusts to pay over were authorized there was obviously no longer any limitation on the persons for whom such trusts could be created, or the manner in which the funds should be applied.²⁶⁰ A corresponding limitation on the scope of section 63 should have been enacted, or read into it by construction. The present absurd result, that the interest of the *cestui que trust* of every trust under this subdivision is absolutely inalienable, voluntarily or involuntarily, and cannot be made alienable by direction of the settlor or of the Supreme Court, was certainly never intended by the revisers nor by the legislature.^{260a}

Object of making alienation by trustee void. Turning to sections 64 and 65, the object of the revisers in these sections seems to have been to confirm secret trusts (trusts not declared in the conveyance to the trustee or in the will of the testator) only as against the trustee and his prior creditors and subsequent creditors and purchasers with notice, but where the trust was expressed in the instrument vesting the estate, all the world was given notice thereof, and the provision that "every sale, conveyance or other act of the trustees, in contravention of the trust shall be absolutely void" was little more than declaratory of the common law rule as to purchasers from a trustee with notice of his breach of trust.²⁶¹ It is significant that no corresponding section was enacted in respect of trusts of personal property which might be created by parol without written record.

If it be admitted that the fact that the trustee does not have the power to alienate the trust estate suspends the power of alienation as to such property, then one looks in vain for a provision of the sections dealing with real property, which logically supports the universal holding of the cases that a power of sale in the trustee, the resulting funds to continue subject to the trust, is not such a power of alienation as is required by the statute. Sections 14, 15 and 16²⁶² would seem to be directed at inalienability resulting from the creation of future contingent estates, or from limitations and conditions in the creation of estates. The interpretation by which they are held to prohibit the continuance of an indestructible trust beyond two lives in being may possibly produce a desirable result, but it is difficult to support by any reading of the statutes. This difficulty arises from the fact

²⁶⁰Notes of Revisers, *supra* note 249, at 33, 34. Cf. Proposed Civ. Code (1865) § 285; *ibid.* (1884) § 401.

^{260a}Cf. Proposed Civ. Code (1865) §§ 295, 296; *ibid.* (1884) §§ 411, 412.

²⁶¹Notes of Revisers, *supra* note 249, at 43. Cf. Proposed Civ. Code (1865) §§ 291, 298; *ibid.* (1884) §§ 407, 414.

²⁶²*Supra* notes 106, 188.

that the revisers were concerned with suspension of the power of alienation by future estates, contingent as to the person, and vesting at a time too remote, and by remote limitations and conditions, and their language is simply not applicable to indestructible trusts and inalienable present interests.

AS TO TRUSTS OF PERSONAL PROPERTY

The decisions by which the courts held that trusts of personal property suspended the absolute ownership of such property are still more difficult to support. The meaning of "suspension of the absolute ownership" has been defined above as practically equivalent to "suspension of the absolute power of alienation."²⁶³ The difference of language between sections 14 and 15, and the personal property section can probably be explained by the fact that the personal property section was drafted later,²⁶⁴ and possibly by a different hand. Perhaps an argument could be made that absolute ownership requires an undivided ownership, not subject to any trust or limitation, but such an argument would rest solely on the difference in wording. The notes of the revisers to the personal property sections indicate that they thought it desirable to bring the rules governing future interests in personal property into harmony with the real property rules on this point. The language of section 1²⁶⁵ prohibits suspension of the absolute ownership "by any limitation of condition," and in section 2,²⁶⁶ it is provided:

"In all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in the first Chapter of this Act, in relation to future estates in lands."

No sections corresponding to sections 60 to 65 were enacted for personal property. No prohibition against alienation was imposed on the trustee or *cestui que trust*. Nor were any restrictions placed on the purposes for which trusts of personal property could be created. If therefore, the construction adopted, that trusts of real property suspended the power of alienation, is open to criticism, *a fortiori*,

²⁶³Notes of Revisers, *supra* note 249, at 49-51.

²⁶⁴Report of Revisers, *supra* note 249, vol. V, pages 16, 17. The personal property sections are embodied in R. S., Part II, Chap. IV, Title IV, now P. P. L. § 11.

The Proposed Civ. Code (1865) defined absolute ownership (§ 172) as follows: "The ownership of property is absolute, when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws." This provision was copied in Proposed Civ. Code (1884) § 280.

²⁶⁵Now P. P. L. § 11, in part.

²⁶⁶Now P. P. L. § 11, in part.

the corresponding holding in respect of trusts of personal property is totally unwarranted. The courts nevertheless did apply to trusts of personal property the same rules which they read into the real property sections. This was accomplished hesitantly at first, and under cover of section 2 of the personal property statute.²⁶⁷ As applied to limitations of future or contingent interests in personal property,²⁶⁸ there can be no quarrel with this result, but the judges were not slow in striving for a uniform rule, applicable to all classes of property in all respects.

It will be interesting to quote the language of some of the judges in respect of rules governing trusts of personal property. In *Hone v. Van Schaick*,²⁶⁹ Chancellor Walworth said:

²⁶⁷*Ham v. Van Orden*, 84 N. Y. 257, 270 (1881), expectant interests in personal property alienable; *Cutting v. Cutting*, 86 N. Y. 522, 544 (1881), real property scheme of powers applies to personal property; *Smith v. Edwards*, 88 N. Y. 93, 103 (1882), vesting; *Bliven v. Seymour*, 88 N. Y. 469, 478 (1882), tenancy in common in a future interest; *Cook v. Lowry*, 95 N. Y. 103, 110 (1884), rules for disposition of surplus accumulation of real property applicable to personal property; *Greenland v. Waddell*, 116 N. Y. 234, 242, 22 N. E. 367 (1889), power of Supreme Court to control trusts, etc; *Mills v. Husson*, 140 N. Y. 99, 35 N. E. 422 (1893), discharge of trusts for creditors after 25 years; *Fargo v. Squiers*, 154 N. Y. 250, 258, 48 N. E. 509 (1897), relation back in law of powers; *Matter of Brown*, 154 N. Y. 313, 324, 48 N. E. 537 (1897), "rules governing estates or interests in lands, whether founded upon statutes or general principles of law, are, so far as practicable, applied to interests or estates of a like character in personal property," citing § 2; *Steinway v. Steinway*, 163 N. Y. 183, 196, 57 N. E. 312 (1900), meaning of "heirs"; *Rudd v. Cornell*, 58 App. Div. 207, 216, 68 N. Y. Supp. 757 (1901), *aff'd*, 171 N. Y. 114, 63 N. E. 823 (1902) can designate "remainder in fee" in personal property; *Matter of Conger*, 81 App. Div. 493, 503, 80 N. Y. Supp. 933 (1903), rule against three successive life estates; *Schlereth v. Schlereth*, 173 N. Y. 444, 66 N. E. 130 (1903), meaning of "heirs" and "issue"; *Reilly v. Reilly*, 82 App. Div. 374, 81 N. Y. Supp. 861 (1903), *aff'd*, 176 N. Y. 597, 68 N. E. 1116 (1903), rule as to passive trusts; *Tuthill v. Davis*, 121 App. Div. 290, 105 N. Y. Supp. 672 (1907), rules as to defeating expectant estates; *N. Y. Life Ins. Co. v. Carey*, 191 N. Y. 33, 83 N. E. 598 (1908), section making expectant estates descendible, devisable and alienable; *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846 (1911), *aff'd*, 203 N. Y. 556, 96 N. E. 1122 (1911), alienability of future contingent interests; *Matter of Horteau*, 204 N. Y. 292, 97 N. E. 726 (1912), "person presumptively entitled to next eventual estate"; *Matter of DePuy*, 194 App. Div. 796, 185 N. Y. Supp. 817 (1920), vesting. See also cases cited, *supra* note 69, first installment of this article (1927) 13 CORNELL LAW QUARTERLY 44.

Cf. *Matter of Crossman*, 113 N. Y. 503, 510, 21 N. E. 180 (1889), "The provision of the Revised Statutes (§ 40) strictly applies only to the rents and profits of real estate. But, by analogy, the same rule should, probably, be applied to the income of personal estate."

²⁶⁸*National Park Bank v. Billings*, *supra* note 267, at 541.

²⁶⁹7 Paige, 221, 234 (N. Y. Chan. 1838).

"The limitation of a trust of personal estate, to receive the future interest or income thereof and to apply it to the use of the cestui que trust for life or any shorter period . . . renders the interest of the cestui que trust in such income inalienable, according to the provisions of the sixty-third section of the same article."

The decision was unanimously affirmed in the Court for the Correction of Errors,²⁷⁰ Bronson, J., stating, however, that "no distinction was made on the argument between the real and personal property included in the trust." In *Kane v. Gott*,²⁷¹ Cowan, J., denied that personal property trusts were governed by the same rules as those involving real property. He said:

"The revised Statutes concerning uses and trusts, 1 R.S. 721, 2d ed., have of themselves nothing to do with personal property, either directly or by reference . . . There is nothing in any part of the statute tying up the trust in *personal* property to receiving and applying the income to the use of any person, or otherwise restricting the mode of appropriation. The third subdivision speaks of the rents and profits of *lands* only . . . It is supposed that 1 R.S. 761, 2, 2d ed., § 1 and 2, place both real and personal property on the same narrow footing as to a *declaration of trust*. But that is not so. These sections relate exclusively to *limitations of future or contingent* interests in personal property, making *them* subjects to the same rules as limitations of *future* estates in lands. The word *limitation*, when applied to future or contingent estates, regards the time at, or condition upon which they are to vest, either as an interest or in possession . . . When the interest is vested, this may be long or short according to the pleasure or caprice of the donor, because the land may always be aliened. But when the limitation is on a contingency it must be confined within certain boundaries of time; otherwise you run into an objectionable perpetuity. This is about all that is meant by the various provisions of the revised statutes against perpetuities."

Judge Cowan then quoted from the notes of the revisers and expressed his opinion that the rules as to trusts of real property should not be extended.²⁷² In *Everitt v. Everitt*,²⁷³ it was apparently assumed that a

²⁷⁰20 Wend. 564 (N. Y. 1838).

²⁷¹24 Wend. 641, 661, 662 (N. Y. 1840). Followed in *Fellows v. Heermans*, 4 Lans. 230, 239 (N. Y. Sup. Ct. 1870); *Forsyth v. Rathbone*, 34 Barb. 388, 408 (N. Y. Sup. Ct. 1860). But see *DePeyster v. Clendening*, 8 Paige, 295, 309 (N. Y. Chan. 1840).

²⁷²"I know that in the case of real estate, § 14 has been extended by construction to a vested interest under § 55 and § 63. But that was grounded on the restraint of alienation arising from the mode of appropriating rents and profits in a trust of *real estate*, and *real estate* only; not by reason of contingent limitation. In the case of personal property, we are still left to the rule in the revisers' note. We are, on the point of perpetuity, to regard the contingent character of the limitation along . . .", at p. 662.

²⁷³29 N. Y. 39 (1864).

trust of personal property would occasion suspension of alienation, but the decision was put on other grounds. In *Graff v. Bonnett*,²⁷⁴ on which all subsequent cases rely, the majority of the court thought the interest of a *cestui que trust* in a trust of personal property was inalienable by reason of section 2 of the personal property statute, by legislative policy and in order to accomplish the purpose of the revised statutes, but the decision was put on another ground. Denio, Ch. J. (Johnson, J., concurring) in an able and careful opinion stated that section 63 did not apply to personal property.²⁷⁵

"The argument which would annex this provision to trusts of personal property, would be equally strong to bring that species of property within the influence of all the provisions of the article concerning uses and trusts; and upon that position no trust of personal property could be created for purposes not within the scope of the fifty-fifth section of the article on uses and trusts. But the rule is notoriously otherwise."

In *Williams v. Thorn*,²⁷⁶ it was held that under section 57 a judgment creditor could reach the surplus income of a personal property trust, Rapalo, J., saying:

"As to the surplus income of personal property, it is likewise so applicable (to creditors). If it is alienable by the debtor, the cases concede that it can be reached. If inalienable it is so only by virtue of § 63; and if § 63 applies to trusts of personalty then § 57 also applies and subjects the surplus income to the claims of creditors."

And in *Cochrane v. Schell*,²⁷⁷ a case involving the question whether a trust could be created under section 55, subdivision 3, for the payment of annuities, and if so, whether such annuitants could alienate their interests, Chief Judge Andrews by euphonious words dealt the fatal blow to the distinction between real and personal property trusts:

"There is a manifest propriety in assimilating as far as practicable the rules governing trusts and limitations of real and personal property, and the tendency in this direction has been very marked in the decisions of the courts (citations). It would be unfortunate, we think, if it was necessary to distinguish between trusts of real and personal property for the payment of annuities of income, holding such trusts valid as to one species of property and void as to the other."

In 1893 section 63 was amended to permit the *cestui que trust* of a trust of real or personal property to acquire the remainder and then destroy the trust. When this statute was repealed in 1903, a statute prohibiting alienation by the beneficiaries of both classes of trusts

²⁷⁴31 N. Y. 9 (1865).

²⁷⁵*Ibid.* 18, 19.

²⁷⁶70 N. Y. 270, 278 (1877).

²⁷⁷140 N. Y. 516, 534, 35 N. E. 971 (1894).

was enacted.²⁷⁸ Since that date it has been held that passive trusts of personal property are executed by analogy to the real property statute, and title passes to the beneficiary.²⁷⁹ Furthermore, it has been held that the interest of a beneficiary of a personal property trust is inalienable though the trust was created in 1879.²⁸⁰ It may now be said that trusts of personal property are governed by the real property rules except in respect of the purposes for which such trusts may be created. So much has been sacrificed to the desire for uniformity that it would not be surprising to find the courts holding in the future that personal property trusts can only be created for the purposes specified in section 55.

It may be desirable that the rules governing trusts of real and personal property shall be uniform, but it is submitted that different considerations of policy govern the tying up of estates in land for the future from those which apply to personal property which is ordinarily a source of profit to the owner only from being used and invested. Michigan, Minnesota and Wisconsin, all of which adopted the New York statutes as to real property,²⁸¹ rejected the sections applicable to personal property, and yet all seem to have prospered notwithstanding this omission. Michigan held the common law rules against perpetuities still applicable to personal property,²⁸² while Wisconsin and Minnesota reached a contrary result.²⁸³ In 1925, however, Wisconsin adopted the New York statute as to personal property.²⁸⁴ It is to be hoped that good fortune will attend her courts in treading the maze marked out by the New York decisions.

AS TO THE RULE AGAINST REMOTENESS

There has been a sharp conflict of opinion whether the revisers and the legislature in 1828 intended a rule against suspension of the

²⁷⁸*Supra* note 70, (1927) 13 CORNELL LAW QUARTERLY 44.

²⁷⁹*Reilly v. Reilly*, *supra* note 267; *Matter of DeRycke*, 99 App. Div. 596, 91 N. Y. Supp. 159 (1904).

²⁸⁰*Stringer v. Young*, 191 N. Y. 157, 83 N. E. 690 (1908).

²⁸¹See the articles cited *supra* note 4, first installment of this paper, (1927) 13 CORNELL LAW QUARTERLY 32.

²⁸²*Toms v. Williams*, 41 Mich. 552, 2 N. W. 814 (1879); *Mich. Trust Co. v. Baker*, *supra* note 254.

²⁸³*In re Towers Estate*, 49 Minn. 371, 52 N. W. 27 (1892); *In re Trust of Bell*, 147 Minn. 62, 179 N. W. 650 (1920); *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92 (1879); *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650 (1902). For an excellent discussion of this problem in Minnesota, see Fraser, *op. cit. supra* note 4, page 32 of this volume, (1925) 9 MINN. L. REV. 314.

²⁸⁴Wis. Stat. (1925), § 230.14, was amended by adding, "Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property. . ." (not retroactive). See Rundell, *op. cit. supra* note 4, page 32 of this volume, (1926) 4 WIS. L. REV. 1, 20.

power of alienation simply, or a rule against remoteness of vesting also. This dispute is complicated by the further uncertainty as to whether the common law rule against perpetuities was, at the time of the adoption of the Revised Statutes, a rule against remoteness of vesting or a rule against suspension of the power of alienation, or both. It would be unprofitable to review this controversy in the present discussion since all the salient points have been presented elsewhere.²⁸⁵ Suffice it to say, that a rule against suspension of the power of alienation is clearly enacted in the Revised Statutes, and explained in the notes of the revisers. There is little in the language of the Revised Statutes or in the notes of the revisers to lend support to the contention that a rule against remoteness of vesting was also intended. Occasional references to vesting can be accounted for on the theory that the statutes were directed at suspension of the power of alienation by the creation of unvested future interests, contingent as to the person, in respect of which a provision for vesting at a time not too remote would remove all difficulty. Thus in section 4²⁸⁶ it is provided, after abolishing the old estate tail, that a remainder limited thereon shall *vest in possession* upon the death of the first taker without issue. Section 13 divides estates into vested and contingent. Section 16 clearly deals with remoteness of vesting, but such as would also suspend the power of alienation. In section 21 it is provided that a contingent remainder on a term of years must vest in interest within two lives in being. And by section 24 a fee limited upon a fee must take effect within the period prescribed in this article. By section 25 future estates in the alternative are provided for where the first shall fail to vest. On the other hand in sections 14 and 15 it is the power of alienation which must not be suspended, and in section 23 it is the suspension of absolute ownership of a term of years that is objected to. By section 36 dispositions of rents and profits shall be governed by rules established in this article in relation to future estates in lands. In section 128 it is the absolute right of alienation that must not be suspended by a power.

When we turn to the notes of the revisers there is hardly a hint that they intended a rule against mere remoteness of vesting un-

²⁸⁵That the N. Y. rule was directed at remoteness of vesting; CHAPLIN, *SUSPENSION OF THE POWER OF ALIENATION* (2d ed. 1911), Chaps. I, VI. *Contra*, FOWLER, *REAL PROPERTY LAW* (3d ed. 1909), 261-316; 2 REEVES, *REAL PROPERTY* (1909) 1260-1266; Canfield, *op. cit. supra* note 4, page 32 of this volume. For an excellent summary, see (1920) 5 CORNELL LAW QUARTERLY 189. As to the common law rule in general, *ibid.* note 13, and for early New York cases, notes 15, 16.

²⁸⁶Now R. P. L. § 32.

accompanied by suspension of the power of alienation. In speaking of the abolition of estates tail, and the acceleration of remainders limited thereon, the following language is used:

"The object of the legislature was to destroy perpetuities, in other words, to prevent the fee from being rendered inalienable, beyond a certain period; and this object is completely attained, if without defeating the remainder, we confine it to vest within the period allowed by law in other cases . . ."²⁸⁷

The attention of the reader is also directed to extracts from the notes of the revisers quoted on the preceding pages.²⁸⁸ If they knew of a common law rule against remoteness of vesting, as seems possible, it is hardly reasonable to suppose they would have intended to conceal that knowledge and continue that rule in force by innuendo merely. If they did not know of such a rule, there is certainly insufficient evidence that they intended to adopt it. Mr. Stewart Chaplin of the New York Bar was the ardent champion of the view that the New York statutes and decisions established a rule against remoteness of vesting in addition to the rules against suspension of the powers of alienation.²⁸⁹ It seems probable that his influence led to the adoption of the rule against remoteness of vesting by the Court of Appeals in 1909.²⁹⁰

VIII. SUGGESTIONS FOR MODIFICATION

It is submitted that the present technical and complex rules in New York, against suspension of the power of alienation of present and future interests for more than two lives in being, and against remoteness of vesting, and the cognate rules rendering trusts of real and personal property indestructible by the trustee and the interests of beneficiaries inalienable, and destroying such trusts if they exceed two lives in being in possible duration, are arbitrary and unnecessarily complicated and hazardous to testators, resulting in a vast amount of litigation and the failure of hundreds of wills. Moreover, these rules in their present form are not required by considerations of the public interest, and were not originally justified by interpretation of the Revised Statutes, but have resulted from successive increments of judicial construction. It is further submitted that, without radical revision or innovation, by a few minor changes, the system can be made more simple, more logical and more workable, and such changes

²⁸⁷Report of Revisers, *supra* note 249, at 12.

²⁸⁸*Supra* p. 173 *et seq.* Cf. Andrews, J., in *Walker v. Marcellus, etc., Ry.*, *supra* note 258a.

²⁸⁹*Supra* note 285. The first edition appeared in 1891.

²⁹⁰*Matter of Wilcox*, 194 N. Y. 288, 87 N. E. 497 (1909).

will result in a decrease of litigation and the preservation of wills, without the hazard of new and difficult hurdles of construction and definition at the hands of the courts.

The settled policy of the common law has been against permitting owners and testators to tie up their property by the creation of remote and inalienable interests. This objection has been extended in most jurisdictions to unvested future interests, if there is any possibility that they will not vest in interest within lives in being, even though such interests may be technically alienable. While not generally followed, New York and a number of other states have established a rule against the continuance of an indestructible trust beyond two lives in being, or beyond lives in being in some of these jurisdictions. The present writer is not disposed to disagree radically with either of the three principles just mentioned. Obviously, the creation of inalienable future interests ties up property and impedes freedom of commercial intercourse. Even the casual student of history knows the evils that have resulted from the continuance and preservation of land laws fashioned by the dead hand of a past generation. Unvested future interests, even though technically alienable, are not commercially desirable and cannot be disposed of at a fair or reasonable valuation, if they are to vest at a time too remote. As a practical matter, the existence of such interests does tie up property and clog the flow of commerce.^{290a} Upon like principles, it seems that in general the creation of trusts where the property in question is rendered inalienable should be prohibited or sharply limited. Furthermore, the creation of indestructible or spendthrift trusts, to endure beyond lives in being, even though the trustees may at all times sell or exchange the specific trust property, is open to like objection.

In respect of the rules as to future contingent interests, the present system in New York seems particularly objectionable in several important respects. *First*, recognition of two objections to unvested future interests, one based on suspension of the power of alienation for more than two lives in being and the other based on remoteness of vesting, is confusing and needlessly complicated. The rule against remoteness of vesting includes the lesser rule against suspending the power of alienation by such interests. As was suggested above, all unvested future interests are open to objection if they will not certainly vest within lives in being at the creation of the interest.

^{290a} Cf. Rundell, *op. cit. supra* note 4, page 32 of this volume, (1926) 4 Wis. L. REV. 1, 11. Limitation to two lives was criticised by McCoun, V. C., in *Lorillard v. Coster*, *supra* note 255, at 196.

It would seem to be desirable to substitute a rule against remoteness of vesting for the present double rule.

Second, the limitation in section 42 of the Real Property Law and section 11 of the Personal Property Law to two lives in being seems entirely illogical, and experience has demonstrated that it gives rise to needless difficulty in the drafting of wills and deeds, and causes a vast amount of litigation, since it in effect makes a distinction between the testator who wishes to provide for only two dependents, and the testator who wishes to provide for three or more dependents, with gifts over at their deaths.²⁹¹ Both of these changes could be accomplished by re-writing section 42²⁹² down to "except" in the second sentence as follows:

"Every contingent future estate and interest, whether created by way of remainder or by any other limitation or condition, shall be void in its creation if by any possibility it will not vest in interest during or at the termination of designated lives in being at the creation of the estate or interest; . . ."

Third, no reason appearing for permitting the designation of lives of strangers as measuring lives, a new sentence should be added at the end of the section to that effect.

Fourth, in the interest of simplicity, section 40²⁹³ should also be amended by adding at the end of the second sentence, "or whose heirs or devisees would be so entitled, whenever and however such precedent estates might terminate." This would do away with much

²⁹¹In *Lorillard v. Coster*, *supra* note 255, at 196, McCoun, V. C., said, "I am at a loss to perceive upon what principle, or for what reason, the statutes should be made to restrict the duration of trusts of that character (trusts to receive and apply the rents and profits of land), to the lives of not more than two persons in being at the time of their creation; when perhaps there may be a large number equally the objects of care, or whose condition and necessities may alike require a continuance of the trust during their respective lives. . . ."

Cf. Goddard, Perpetuity Statutes (1923) 22 MICH. L. REV. 95, 103 *et seq.*; Gray, *op. cit. supra* note 227, § 749.

²⁹²Quoted *supra* note 188, (1927) 13 CORNELL LAW QUARTERLY 67.

²⁹³R. P. L. § 40, "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." Formerly R. S. § 13. *Cf. Gray, op. cit. supra* note 227, § 101, "A remainder is vested in A., when, throughout its continuance, A., or A. and his heirs, have the right to the immediate possession, whenever and however the preceding freehold estates may determine. A remainder is contingent if, in order for it to come into possession the fulfilment of some condition precedent other than the determination of the preceding freehold estates is necessary."

of the difficulty of determining when future estates are vested and when contingent in New York. These proposed changes would not abolish the rule against suspension of alienation by the creation of future interests, contingent as to the person, since such interests are contained within the classification of "contingent future interests." *Fifth*, for the purpose of consistency, the following changes should also be made. In section 46²⁹⁴ strike out "not more than two." Section 49²⁹⁵ should be rewritten beginning with "so that" as follows:

"So that the vesting of a term of years or an interest therein shall not by any possibility be suspended for a longer period than during lives in being at the creation of such term or interest."

In section 178,²⁹⁶ "absolute power of alienation" should be changed to "vesting of contingent future interests."

The writer sees no objection to permitting the limitation of future contingent interests, to vest after a gross period of twenty-one years, as it is not always convenient to measure the period of remoteness by lives. Such gross period should not, however, be allowed in addition to lives, as at common law.²⁹⁷ The statutes could be easily changed to permit such gross period.

With reference to trusts, the present system seems arbitrary and needlessly technical and unworkable in the following particulars: *First*, it compels every testator and settlor who would create a trust, to create a spendthrift trust. As has been pointed out above, the present writer is unable to see any justification for this rule and is convinced that it was not contemplated by the revisers or the legislature in 1828.²⁹⁸ It should be abolished, but probably the settlor

²⁹⁴R. P. L. § 46, defining the period within which a contingent remainder on a term of years must vest in interest.

²⁹⁵R. P. L. § 49, "All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of free hold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee."

²⁹⁶R. P. L. § 178, defining the period *during* which the "absolute right of alienation" may be suspended by an instrument in execution of a power.

²⁹⁷This would provide for such cases as *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869 (1895), legacy payable to C on a contingency which must happen within one year after testator's death if ever; *Walker v. Marcellus, etc.*, Ry., *supra* note 258a, reservation of determinable fee in lime kiln, subject to collateral limitation, upon which it should pass to grantee of rest of land; *In re Water Front, etc.*, 246 N. Y. 1, 157 N. E. 911 (1927), option to be exercised in future (held valid by Court of Appeals). None of these seem open to objection if limited to a reasonable period. Wis. Stat. (1925) §§ 230.15, 230.16 permit both 21 years and infancy.

²⁹⁸See the able and vigorous criticism in GRAY, *RESTRAINTS ON ALIENATION* (2d ed. 1895), Appx. I.

and testator should be allowed to render a trust indestructible for a limited period only, by express language. For the sake of uniformity and to bring the law into harmony with the provisions as to future interests, the period of lives in being is suggested. *Second*, there can be no serious objection to the creation of trusts for a period in gross, properly limited. Such trusts are often urgently needed, and their prohibition leads to their failure or the arbitrary measuring of such trusts by lives. The period of twenty-one years has been selected since it accords with the period of minority and for its common law associations. The changes suggested below would accomplish these objects, but would still prevent the creation of indestructible trusts to which objection might be made.

Subdivision three of section 96²⁹⁹ should be amended to permit trusts for a gross period of years, by inserting after "shorter term," the words "or for a period of not more than 21 years." In section 100 the second "legal" should be eliminated.³⁰⁰ Section 103 (1)³⁰¹ should be rewritten, beginning with the words "can not," as follows,

"may be rendered inalienable by express direction of the settlor of the trust in the instrument creating such trust, for the period of a designated life or lives in being at the creation of such trust, or for a gross period of not more than 21 years, but not thereafter. And after the expiration of such life or lives, or period of years, any competent beneficiary of such trust shall be entitled to terminate it as to his interest or share by demanding a conveyance from the trustee."

This change would abolish suspension of the power of alienation by the creation of indestructible trusts to continue after lives in being. Section 109³⁰² should be amended accordingly by inserting after the first clause, "or when the beneficiary demands a conveyance of the *corpus* in accordance with the provisions of section 103."

Corresponding changes in the personal property sections should be effected by changing the first four words of section 11³⁰³ to "the vesting of future contingent interests in." And section 15³⁰⁴ should be

²⁹⁹R. P. L. § 96; formerly R. S. § 55, *supra* p. 33.

³⁰⁰*Supra* p. 43 and note 65.

³⁰¹R. P. L. § 103 (1), "The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred."

³⁰²R. P. L. § 109, "When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease."

³⁰³Quoted *supra* p. 50.

³⁰⁴P. P. L. § 15, "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. . ."

amended by striking out the last clause, "cannot be transferred," etc., and the sentence following, and substituting,

"... may be rendered inalienable for the period of a designated life or lives in being at the creation of such trust, or for a gross period of not more than 21 years, but not longer, by express written direction of the creator of the trust in an instrument executed and acknowledged after the manner of deeds conveying lands, which shall be recorded in the office of the register of deeds in the county where such beneficiary resides at the creation of the trust, and a certified copy thereof shall be delivered to the trustee. And after the expiration of such life or lives, or period of years, any competent beneficiary of such trust shall be entitled to terminate it as to his interest or share by demanding the fund or property from the trustee."

This would bring the rules as to alienation and termination of personal property trusts into harmony with the corresponding rules relating to trusts of real property. The provisions as to recording are deemed necessary for the protection of the trustee and assignees and creditors of the beneficiary, since personal property trusts can be created by parol, and a settlor who wishes to make the interest of a beneficiary inalienable should make a written record of that fact.